

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Transfer)
of Certificate Nos. 404-W and)
341-S in Orange County from Econ)
Utilities Corporation to)
Wedgefield Utilities, Inc.)

DOCKET NO. 960235-WS

ORIGINAL
FILE COPY

In Re: Application for)
Amendment of Certificate Nos.)
404-W and 341-S in Orange County)
by Wedgefield Utilities, Inc.)

DOCKET NO. 960283-WS

Submitted for Filing:
August 26, 1997

WEDGEFIELD UTILITY'S RESPONSE TO
CITIZENS' MOTION FOR RECONSIDERATION
AND CITIZENS' REQUEST FOR ORAL ARGUMENT

COMES NOW Utilities, Inc. and its wholly owned subsidiary, Wedgefield Utilities, Inc., (hereinafter collectively referred to as "Utilities, Inc.") and in support of its Response to Citizens' Motion for Reconsideration and Request for Oral Argument states:

1. The prehearing conference was held on August 4, 1997, and the Prehearing Order No PSC-97-0952-PHO-WS was issued August 11, 1997. The Office of Public Counsel (OPC) has now filed a Motion for Reconsideration of the Prehearing Order and has filed a Request for Oral Argument on that Motion.

2. OPC's Motion for Reconsideration and Request for Oral Argument should be denied. The matters sought to be raised by OPC are within the jurisdiction of the Division of Administrative Hearings (DOAH), not the Public Service Commission. Apparently, OPC seeks to raise the question of whether the Commission is applying "non-rule policy" in this proceeding. If OPC believes

DOCUMENT NUMBER-DATE

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- ACK _____
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- SEC 1 _____
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- OTH _____

that non-rule policy is being applied, or will be applied, in this case, OPC may file a rule challenge with DOAH. For example, see Section 120.56, Florida Statutes, particularly subsection (3) Challenging Existing Rules; Special Provisions, and subsection (4) Challenging Agency Statements Defined as Rules; Special Provisions. Pursuant to the Florida Administrative Procedure Act, DOAH and not the Public Service Commission has been assigned jurisdiction over that type of proceeding.

Procedural Background

3. It was not until the pre-prehearing conference that the Office of Public Counsel (OPC) raised the question of whether the Commission has a binding policy on acquisition adjustments. That matter eventually evolved into the issue as stated in "Issue 11" of the July 28, 1997 draft prehearing order and as now stated in OPC's Motion for Reconsideration. That draft prehearing order was submitted by Staff to the parties for consideration at the prehearing conference. A copy of the cover page and issues numbered 10 and 11 from the July 28, 1997 draft prehearing order (pages 1, 12 and 13) is attached as Exhibit #1.

4. In the context of the pre-prehearing conference, Utilities, Inc. had no alternative but to prepare and submit a response to the matter as raised by OPC. Failure to submit a position on any matter listed as an issue risks having the matter decided against the party failing to take a position.

5. In response to the OPC's statement of an issue,

Utilities, Inc. submitted its own "issue", which, due to reorganizing of the issues by Staff in the draft, was numbered issue 10. As reworded at the prehearing conference it states:

If the Commission does not currently have a binding policy on acquisition adjustments, can the Commission make an acquisition adjustment in this case (on a case by case basis), or must the Commission dismiss this case and initiate a generic rulemaking proceeding and adopt a formal rule before it can make an acquisition adjustment?

(The original wording of issue 10 referred to "the preceding issue" but was intended to refer to OPC's "issue" 11. Therefore, as a preliminary matter at the prehearing conference on August 4, the numbers of the two issues were reversed. Issue 11 became issue 10, and issue 10 became issue 11.)

Prior Pleadings by Utilities, Inc. and PSC Orders

6. In prior pleadings and motions, Utilities, Inc. had specifically raised the issue of whether OPC intended to follow existing policy of the Commission on acquisition adjustments, or whether it would be attempting to challenge that policy. OPC filed a notice of intervention on September 4, 1996. OPC's intentions were unclear. Late on October 28, 1996, the last day to file, OPC still had not filed a protest and request for hearing, so Utilities, Inc. filed a Contingent Request for Hearing On Order No PSC-96-1241-FOR-WS, Including the Approval of Transfer and the Grant of Additional Territory. In paragraph 5 thereof, Utilities, Inc. stated:

5. It appears that the OPC may use this case

as a vehicle for challenging the Commission's long-standing policy of not granting a positive or negative acquisition adjustment absent [extraordinary] circumstances. If the OPC were to prevail, the "rules of the game" under which water and sewer utilities have been acquired will be significantly changed. Such a change in this case would be a retroactive change in the rules. As such, Utilities, Inc. would be required to re-evaluate the prudence of acquiring the Wedgefield Utility system. Consequently, petitioners request that the transfer and service territory issues not be bifurcated from the rate base issue, if a timely protest or request for hearing is filed by October 28, 1996.

7. By Order No. PSC-97-0104-FOF-WS issued January 27, 1997, the Commission granted OPC's motion to strike the Contingent Request for Hearing.

8. On February 1, 1997, Utilities Inc. filed its Motion to Assign Dockets to the Full Commission and stated:

3. The case involves an issue (negative acquisition adjustment) which previously has been the subject of many decisions of the Public Service Commission since the policy was established in or about 1983. The question of whether to change that policy was considered and rejected by the full Commission in Order No. 23376 issued in Docket No. 891309-WS. The Order was protested by the Office of Public Counsel (OPC), and after hearings, the Commission affirmed its prior existing acquisition adjustment policy without any changes. Some individual case proceedings other than in that docket have been held by less [than] the full Commission, but they all have been consistent with the overall Commission policy on acquisition adjustments.

4. It would be inappropriate for [a] panel of less than the full Commission membership to decide the current case, because any decision other than to deny any acquisition adjustment (either positive or negative) would result in a change of current Commission policy on

acquisition adjustments. If the challenge to the PAA order intends to (or in fact does) change the prior overall policy, then the full commission should be involved in making that decision. . . .

It was still unclear just what OPC was trying to do by intervening in this docket, and OPC's responsive pleadings had carefully avoided stating its position on whether it would be seeking to change existing Commission policy or whether it would follow Commission policy and merely try to show that exceptional circumstances existing which would warrant a negative acquisition adjustment. Utilities, Inc. felt that questions which OPC might seek to raise to change existing Commission policy should be brought before the full Commission, and in paragraph 7 of its Motion to Assign Dockets to the Full Commission, Utilities, Inc. stated:

7. Movants reserve all objections, including but not limited to failure to consider this matter in a generic proceeding as required by the Administrative Procedure Act, Ch. 120, F.S.

9. By Order No. PSC-97-0377-FOF-WS issued on April 7, 1997, the Commission denied the Motion to Assign Dockets to the Full Commission and on page 3 stated:

. . . . Finally, with regard to the effect on regulatory policies, the Commission panel's grant of an acquisition adjustment based on the specific facts of this case does not have to be a change in Commission policy, but could be a finding of extraordinary circumstances
. . . .

Therefore, the essence of issue 11 sought to be raised by OPC is contrary to the prior rulings of the full Commission in this

docket.

10. Based upon the Commission's orders denying Utilities, Inc.'s Contingent Request for Hearing and denying its Motion to Assign Dockets to the Full Commission, Utilities, Inc. has been led to believe that the Commission was going to follow its existing policy on acquisition adjustments in this case, and that the only matter for consideration was whether extraordinary circumstances existed warranting a negative acquisition adjustment. OPC's belated attempt to introduce its "Issue 11" into the preliminary prehearing process is an attempt to circumvent the prior orders of the Commission in this docket.

11. By entering those prior orders in this docket, it is evident that the Commission did not feel it was applying non-rule policy in this case.

12. Since 1983, the Commission's policy has been that, absent extraordinary circumstances, the purchase of a utility system at a premium or discount shall not affect the rate base, and the proponent of an acquisition adjustment, either positive or negative, bears the burden of proof. This is an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency.

13. In paragraph 3 on page 3, OPC's Motion for Reconsideration states:

The issue is an important one because it deals with the threshold tests (or absence of such tests) that must be met in order to recognize the negative acquisition adjustment in this

case.

By its orders entered in this docket, and by its prior orders relating to acquisition adjustments, the Commission has made it clear that it has a policy on acquisition adjustments and that it intends to follow that policy in this case. Even the dissent in the PAA order approving the transfer acknowledged the existence of the Commission policy on acquisition adjustments and merely objects to the existing policy. If OPC does not wish to be bound by that policy, its remedy is to file a challenge with DOAH.

14. Paragraph 4 on page 3 of OPC's Motion for Reconsideration complains that staff orally moved to strike the issue and that no prior notice was given to the parties about staff's motion. It is curious indeed that OPC now complains of a practice which it has used itself in prior cases. There is no prohibition against making an oral motion at a prehearing conference, and there is no requirement of notice of an oral motion.

15. OPC's reference to Section 120.57(1)(b), F.S., seeks to claim a right to designate as a Commission issue a legal matter which, if relevant, should be properly before DOAH. OPC's remedy is to file the proper petition at DOAH, not to try to bootstrap a non-jurisdictional matter into this proceeding.

16. OPC's reference to Section 350.0611(1), F.S., seeks to do the same thing. That statute does not convey upon OPC the right to transfer jurisdiction from one state agency to another.

17. Utilities, Inc. adopts and incorporates herein its positions on the two matters in question, designated in Exhibit #1

as issues 10 and 11. Either the Commission has a current, binding policy on acquisition adjustments as set forth in paragraph 12 above, or if no such binding policy exists, the Commission must dismiss this case. In that case, the Proposed Agency Action Order (PAA) in this docket will become final. If no binding policy exists, the Commission can, if it so chooses, initiate a generic rulemaking proceeding on acquisition adjustments, but the new Administrative Procedure Act does not allow a case-by-case adjudication of policy.

18. Furthermore, the APA does not allow case-by-case changes in the burden of proof. The Commission's policy, as stated in paragraph 12 above, is that the proponent of an acquisition adjustment, either positive or negative, bears the burden of proof. If the Commission's policy on burden of proof is to be changed, it must be changed in a generic proceeding before the Commission, not on a case-by-case basis. Staff's initial position on burden of proof in issue 8 of the prehearing order is inconsistent with Commission policy. The about-face taken in the Staff's initial position would shift the burden of proof away from the proponent of the acquisition adjustment and require the utility to prove a negative; that is, that there is no circumstance which would warrant a negative acquisition adjustment. That is impossible. The proponent of a negative acquisition adjustment is the only one who knows why they are seeking such an adjustment, and it is up to the proponent to prove their case. To shift the burden of proof would make a shambles of Commission proceedings. A copy

of the cover page and issue number 8 from the Prehearing Order No. 97-0952-PHO-WS issued August 11, 1997 (pages 1 and 10) including statements of positions of the parties is attached as Exhibit #2. See also the discussion of the problem in the transcript of the prehearing conference held August 4, 1997. The cover page and page 17 (beginning on line 10) and page 18 from the transcript is attached as Exhibit #3.

The Prehearing Conference held on August 4, 1997

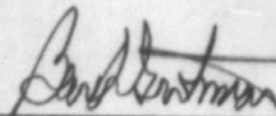
19. At the prehearing conference, Staff initially made an oral motion to strike "issues" 10 and 11. After lengthy discussion and argument presented by attorneys for the Staff, attorneys for OPC, and the attorney for Utilities, Inc., the prehearing officer granted Staff's motion to strike. (Tr. of prehearing conference on 8/4/97, page 25, line 2.) Then, after looking over the statement of OPC's position on one of the "issues", Staff withdrew its motion to strike. (Tr. page 33, line 19.) (The prehearing officer subsequently rule that the positions of a party was irrelevant to granting the motion to strike - the relevant matter was the wording of the issue, not any party's position thereon. See Tr. page 38, line 13.). Counsel for Utilities, Inc. immediately made the same motion to strike issues 10 and 11, and after further extensive discussion and argument by attorneys for OPC, Staff and Utilities, Inc., the prehearing officer granted the motion by Utilities, Inc., to strike issues 10 and 11. (Tr. page 38, line 7 and page 45, line 3.) As discussed in paragraph 2 of this Response, what OPC seeks

by including the issue in this proceeding is within the jurisdiction of the Division of Administrative Hearings, not the Public Service Commission.

20. Utilities, Inc. also requests that OPC's Motion and Request for Oral Argument not be ruled upon by the full Commission until after the Commission has ruled on the pending Verified Petition and Suggestion of Disqualification.

WHEREFORE, Utilities, Inc. respectfully requests that the Commission deny the Motion for Reconsideration and deny the Request for Oral Argument. However, if the OPC motion is granted, the both issues 10 and 11 must be included and ruled upon by the full Commission.

RESPECTFULLY SUBMITTED, this 26th day of August, 1997.

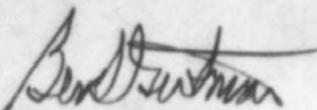


Ben E. Girtman
FL BAR NO. 186039
1020 E. Lafayette St.
Suite 207
Tallahassee, FL 32301

Attorney for Utilities, Inc.
and Wedgefield Utilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Charles Beck, Esq., Office of Public Counsel, 111 W. Madison St., Tallahassee, FL 32399-1400; Mr. John Forrer, Econ Utilities, Inc., 1714 Hoban Rd. NW, Washington, D.C. 20007; and to Jennifer Brubaker, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, by U.S. Mail (or by hand delivery * or facsimile #) this 26th day of August, 1997.



Ben E. Girtman

DRAFT - JULY 28, 1997

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Transfer
of Certificates Nos. 404-W and
341-S in Orange County from Econ
Utilities Corporation to
Wedgefield Utilities, Inc.

DOCKET NO. 960235-WS

In re: Application for Amendment
of Certificates Nos. 404-W and
341-S in Orange County by
Wedgefield Utilities, Inc.

DOCKET NO. 960283-WS
ORDER NO.
ISSUED:

Pursuant to Notice, a Prehearing Conference was held on August 4, 1997, in Tallahassee, Florida, before Commissioner Joe A. Garcia, as Prehearing Officer.

APPEARANCES:

Ben E. Girtman, Esquire, 1020 East Lafayette Street, Suite 207, Tallahassee, Florida 32301-4552
On behalf of Wedgefield Utilities, Inc.

Charles Beck, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Suite 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida

Jennifer S. Brubaker, Esquire, Bobbie L. Reyes, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CASE BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield or utility) filed an application for the transfer of Certificates Nos. 404-W and 341-S from Econ Utilities Corporation (Econ) to



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WEDGEFIELD'S ISSUE IN RESPONSE TO OPC'S ISSUE, *the Commission does not currently have a binding policy on acquisition adjustment.*

ISSUE 10: *is "no," Can*
 If the answer to the preceding issue is "no," can the Commission make an acquisition adjustment in this case (on a case by case basis), or must the Commission dismiss this case and initiate a generic rulemaking proceeding and adopt a formal rule before it can make an acquisition adjustment?

POSITIONS

WEDGEFIELD:

If the Commission has no valid, binding acquisition adjustment policy, then in accordance with the Administrative Procedure Act, Chapter 120, Florida Statutes, it cannot engage in incipient rulemaking on a case-by-case basis and it must dismiss the pending proceeding. That would make the Commission's PAA Order No. PSC-96-1241-FOF-WS a final order of the Commission, setting rate base for the transfer.

CITIZENS:

The Commission can recognize an acquisition adjustment in this case.

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STAFF:

A determination of rate base inclusion of an acquisition adjustment is made on a case-by-case basis. The Commission does not have the discretion to hear a challenge to its own rules; such a challenge would have to be brought before the Division of Administrative Hearings.

~~WEDGEFIELD'S~~
~~PROPOSED~~ 10
~~ISSUE NO. 11:~~

OPC: PROPOSED ISSUE.

Is the Commission's current acquisition adjustment policy, as set forth in Order Nos. 23376 and 25729, binding in this case?

POSITIONS

WEDGEFIELD:

Yes. The policy set out in Order Nos. 23376 and 25729 confirms policy developed on a case-by-case basis and previously in effect since at least 1983. The policy set out in those orders meets the definition of a rule in Section 120.52(15), Florida Statutes. The procedure followed by the Commission in adopting this policy conforms to the procedure required in Section 120.54, Florida Statutes, for adopting a rule. Even though the Commission has not assigned a rule number to the policy, it is, under Chapter 120, Florida Statutes, a rule, and is binding in this case. The utility in this case has rightfully relied on that policy in entering into a contract to purchase another utility, also regulated by this Commission. Just because the Commission has failed in its obligation to formally assign a rule number, does not mean it can now act as if the policy does not exist and as if Chapter 120, Florida Statutes, does not exist, and reconsider the policy on a case-by-case basis. Such an action would violate the utility's right to due process. The policy set forth in Order Nos. 23376 and 25729 is binding on this case and all cases until such time as it may be changed in accordance with the generic rulemaking procedures set forth in Chapter 120, Florida Statutes.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Transfer
of Certificates Nos. 404-W and
341-S in Orange County from Econ
Utilities Corporation to
Wedgefield Utilities, Inc.

DOCKET NO. 960235-WS

In re: Application for Amendment
of Certificates Nos. 404-W and
341-S in Orange County by
Wedgefield Utilities, Inc.

DOCKET NO. 960283-WS
ORDER NO. PSC-97-0952-PHO-WS
ISSUED: August 11, 1997

Pursuant to Notice, a Prehearing Conference was held on August 4, 1997, in Tallahassee, Florida, before Commissioner Joe A. Garcia, as Prehearing Officer.

APPEARANCES:

Ben E. Girtman, Esquire, 1020 East Lafayette Street,
Suite 207, Tallahassee, Florida 32301-4552
On behalf of Wedgefield Utilities, Inc.

Jack Shreve, Esquire and Charles Beck, Esquire, Office of
Public Counsel, c/o The Florida Legislature, 111 West
Madison Street, Suite 812, Tallahassee, Florida 32399-
1400
On behalf of the Citizens of the State of Florida

Jennifer S. Brubaker, Esquire and Bobbie L. Reyes,
Esquire, Florida Public Service Commission, 2540 Shumard
Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CASE BACKGROUND

On February 27, 1996, Wedgefield Utilities, Inc. (Wedgefield or utility) filed an application for the transfer of Certificates Nos. 404-W and 341-S from Econ Utilities Corporation (Econ) to Wedgefield. On March 5, 1996, Wedgefield filed an application for amendment of Certificates Nos. 404-W and 341-S to include additional territory in Orange County. In Order No. PSC-96-1241-



ISSUE 8: Who bears the burden of proving whether an acquisition adjustment should be included in the rate base?

POSITIONS

WEDGEFIELD: In accordance with Commission Order No. 23376 issued 8/21/90 and Order No. 25729 issued 2/17/92, the proponent of an acquisition adjustment, either negative or positive, bears the burden of proof. OPC is the only proponent of an acquisition adjustment in this case and, therefore, OPC alone bears the burden of proof. (Wenz, Seidman)

CITIZENS: The utility should bear the burden of justifying why its actual investment should not be used for rate base. (Larkin)

STAFF: Rate base inclusion of an acquisition adjustment changes rate base and will ultimately affect the utility's rates. While the burden of going forward with the evidence as to the issue of rate base inclusion of an acquisition adjustment may shift in any particular case, the ultimate burden of proof remains on the applicant utility.

ISSUE 9: Must extraordinary circumstances be shown in order to warrant rate base inclusion of an acquisition adjustment?

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 960235-WB
: Application for transfer of :
: Certificates Nos. 404-W and :
: 341-S in Orange County by :
: Wedgefield Utilities, Inc. :

In the Matter of : DOCKET NO. 960283-WB
: Application for amendment of :
: Certificates Nos. 404-W and :
: 341-S in Orange County by :
: Wedgefield Utilities, Inc. :



PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER JOE GARCIA
Prehearing Officer

DATE: Monday, August 4, 1997

TIME: Commenced at 1:30 p.m.
Concluded at 2:45 p.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JOY KELLY, CSR, RPR
Chief, Bureau of Reporting

EXHIBIT
3

DOCUMENT NUMBER-DATE
07937 AUG-65
FPSC-RECORDS/REPORTING

1 MR. GIRTMAN: We also would like to have her
2 there if possible. As long as we're talking about the
3 Stipulation No. 4, we have a change to that if you'd
4 like to deal with that now or wait until we go through
5 the rest of it.

6 COMMISSIONER GARCIA: Let's wait until we go
7 through the rest of it so we can put it all away. All
8 right. So we go on. I'm going to leave 5 in then.
9 We go to 6, which we already agreed to. 7. 8. 9.

10 MR. GIRTMAN: Commissioner, if I could for a
11 moment, on Issue 8, who bears the burden of proving
12 whether an acquisition adjustment should be included
13 in the rate base?

14 Heretofore the orders of the Commission have
15 read that the burden is on the proponent of the
16 acquisition adjustment. If you're seeking a positive
17 acquisition adjustment, you bear the burden; if you're
18 seeking a negative acquisition adjustment, you bear
19 the burden, regardless of who it is that is seeking
20 it.

21 The concern that I have in the statement of
22 the issue is that it forces us to prove a negative.
23 It forces us to prove there is nothing which warrants
24 a negative acquisition adjustment. And when we get on
25 down into the legal issues you'll find that it's

1 somewhat unclear, at least in the challenger's point
2 of view, as to whether or not you have a binding
3 policy on acquisition adjustments in any case.

4 And my concern -- I understand that somebody
5 wants the issue there and the positions have been
6 stated there. But I just wanted to make a point here
7 at the prehearing that if the burden as stated by the
8 Staff were to exist, then that requires the applicant
9 to prove a negative and I don't know that we can do
10 that, and I don't know how it is I'm supposed to prove
11 something I'm not supposed to know how to do anyway.
12 It's a real problem. And we want to be prepared to go
13 through a hearing expeditiously, address the issues,
14 have everybody that has something to say come and say
15 it, but I'm having a real problem of preparing the
16 question of how do I prove a negative? So that said,
17 I think we can go on to the next issue.

18 **COMMISSIONER GARCIA:** Ms. Brubaker, do you
19 want to make that comment?

20 **MS. BRUBAKER:** Commissioner, only that I
21 believe it is a valid issue. I believe the comments
22 Mr. Girtman has made really go to the merits of the
23 issue and is an argument he might make, say, in a
24 brief.

25 **MR. BECK:** I agree. The issue is simple. I